S.B.Civil Second Appeal No.300/2005

Mangu Khan vs. Sarpanch, Gram Panchayat, Mohrai.

Date : 26.8.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. DS Udawat, for the appellant.

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Heard learned counsel for the appellant.

The appellant/plaintiff's suit for grant of permanent injunction was dismissed by the trial court on the ground that the suit has been filed without giving notice under Section 79 of the Rajasthan Panchayat Act, 1959 which was in force at the time of filing of the suit. It is not in dispute that the notice as required under Section 79 of the Panchayat Act was not served upon the defendant. The defendant raised objection by submitting an application under Order 7 Rule 11 CPC which was not decided by the trial court and the defendant took objection about the maintainability of the suit in the written statement upon which issues were framed. However, on earlier occasion, the trial court with the consent of both the parties ordered that the issue about maintainability of the suit for want of notice will be decided after evidence of the parties but subsequently on 20.2.2003, the defendant submitted an application under Order 14 Rule 2 C.P.C. stating therein that since the issue about the maintainability of the suit is a pure question of law, therefore, that issue be decided

first. The trial court allowed the application and proceeded to decide the issue about the maintainability of the suit. The trial court, after detail discussion held that the suit of the plaintiff is not maintainable as no notice as required under Section 79 of the Panchayat Act was served by the plaintiff before filing of the suit. The appellant preferred appeal against the judgment and decree dated 24.2.2003 which was dismissed by the first appellate court vide judgment dated 2.8.2005. Hence, this second appeal.

According to learned counsel for the appellant, once the trial court held that the issue of want of notice is a mixed question of fact and law, then the trial court should not have decided the issue as preliminary issue on application filed by the defendant. However, it is not in dispute that no notice under Section 79 of the Panchayat Act was served by the plaintiff before institution of the suit.

In view of the fact that the defendant raised objection about non-maintainability of the suit immediately by filing application under Order 7 Rule 11 C.P.C. and by raising objection in the written statement, then it is not a case even of waiver of notice and since the plaintiff/appellant before this Court also failed to justify the filing of the suit without complying the statutory requirement of service of notice upon the respondent, therefore, there arises no reason for this Court to interfere in the second appeal in

such a matter where after dismissal of the suit for want of notice, the plaintiff can institute the suit after service of notice. Otherwise also, when the notice itself is not served, then there arises no question of fact to be determined and it is not a case where the question about legality of the notice is involved in the suit. It is a case of total want of service of notice.

No substantial question of law is involved in this appeal. Hence, this second appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya